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In The
Supreme Court of the United States

October Term, 1942

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No. —

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W. L. NIX

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

EUSTIS MYERS,
Dallas, Texas
Counsel for Petitioner

HOWARD DAILEY,
Of Counsel.



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W. L. NIX

vs.

THE UNITED STATES OF AMERICA

PETITION

To the Honorable, the Supreme Court of the United States:

Comes now petitioner, W. L. Nix, appellant below, and petitioning for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully shows:

Statement of the Case

On February 16th, 1937, there was returned to the United States District Court for the Northern District of

134651

Texas, Dallas Division, Indictment No. 8920, charging petitioner in 34 counts with having wilfully and unlawfully attempted to defeat and evade payment of the taxes on gasoline manufactured by him, and with having wilfully and unlawfully failed and refused to pay such Taxes, in violation of Section 3412, Title 26, U. S. C. A., and No. 8922, charging petitioner and Sid B. Pope with having violated the same statute, laws, and regulations thereunder, in 14 Counts.

The even counts of each of these indictments attempt to charge the wilful and unlawful failure and refusal to pay taxes due, and the odd counts charge the wilful and unlawful attempt to defeat and evade such payments. Each of the odd counts of the indictment, while attempting to charge such attempt to defeat and evade payment of the taxes due, charge also the wilful and unlawful failure and refusal to pay same, thereby charging two distinct and separate offenses in the same Counts of the indictments. Each and every count of the indictments allege that the gasoline manufactured and sold by petitioner, upon which the taxes became due, were sold to persons, not within the excepted classes to whom gasoline might be sold tax free, to wit, "a producer of gasoline", but did not plead such gasoline was not sold to numerous of the other excepted classes of persons.

Appellant seasonably and timely filed his general and special demurrers to each of the indictments, and moved to quash each of them and each count of them alleging, among

other things, that the odd counts of each of them were duplicitious, in that each of such odd counts attempt to charge two offenses, towit, the wilful and unlawful attempt to defeat and evade the payment of the taxes alleged to have been due, and the wilful failure and refusal to pay such taxes; urging also in his said demurrer, petitioner set out that there was a fatal misjoinder of offenses in each of said indictments, in that Counts 1 to 14 allege such violation by petitioner while operating Texas Refinery; Counts 15 and 16 charge such violations operating Texas Refinery, Adams Oil Co., lessee; counts 17 and 18 charge such violations operating A. J. Adams Oil Co., Texas Plant; counts 19 to 22, inclusive, charge such violation while operating Keystone Refinery; counts 23 and 24 charge such violations operating Keystone Refinery, Adams Oil Co., lessee; counts 25 and 26 charge such violations by operation of Triangle Refinery, Adams Oil Co., lessee; counts 27 and 28 charge such violations while operating A. J. Adams Oil Company, Triangle Refinery; and counts 31 to 34, inclusive, charge such violations while operating Adams Oil Company, Big Sand Plant, with no allegations (which also were not proved during the trial) of common ownership and control, and petitioner alleged in his said demurrer and motion to quash that each of the violations alleged to have been committed by petitioner in the operation of the separate and distinct refineries, if committed at all, were separate and distinct offenses, and not so connected together as would permit their prosecu-

tion in one indictment, all of which were by the Court overruled, and petitioner then and there excepted. At the close of the Government's case upon the trial, and when both sides had closed, petitioner renewed each of his demurrers and motions to quash, which were again overruled, and to which petitioner again duly excepted.

The case was called for trial on June 14th, 1937, the indictments, Nos. 8920 and 8922, were consolidated as to petitioner, since that at a previous term of this Court, Sid B. Pope had entered his plea of guilty to the offenses charged in cause No. 8922, and had been given eighteen months in the United States Penitentiary at Leavenworth, Kansas, suspended for two years, conditioned upon good behavior, and only petitioner remained to be tried. On the 16th day of June, 1937, petitioner was convicted on each and every count of the indictments, consolidated, and was by the Court sentenced to pay a fine of \$10,000.00 on counts 2, 4, 6, 8, and 10, and to serve Five years in the United States Penitentiary at Leavenworth, Kansas on the remaining counts, generally, the five years to be suspended, conditioned (1) good behavior; (2) the payment of \$5,000.00 of the fine within 90 days; (3) remaining \$5,000.00 in 18 months; (4) the payment to the Government of the taxes alleged to be due (some \$84,000.00 plus penalties and interests) within eighteen months.

At the close of the Government's case, after having renewed his general and special demurrers and motions to quash, as above set out, petitioner moved for an instructed

verdict of not guilty, for the reasons that (1) there was a fatal variance between the allegations and proof, in that it was alleged in the indictment that petitioner sold gasoline set out in the indictment to persons not within the excepted classes, towit, "producers of gasoline", whereas, in truth and in fact, each and every sale alleged to have been made by petitioner upon which he owed taxes had been sold to "producers of gasoline" for resale, and such transactions were exempt from the payment of the taxes; and (2) because the law under which petitioner was being tried (Sec 3412, Title 26, U. S. C. A.) exempted petitioner from the payment of taxes on these sales. Although each and every witness produced by the government to testify of the sales of gasoline upon which taxes alleged to have been due, and of which petitioner was charged with having attempted to defeat and evade and with having wilfully failed and refused to pay, testified such gasoline had been sold to "a producer of gasoline" for resale, the Court overruled the motion, which was renewed when defendant had rested his case, and when both sides had closed, which was also overruled, to all of which appellant then and there duly excepted; the evidence tended to show that petitioner had collected certain of the taxes from the purchasers thereof when the gasoline was sold which were not remitted to the Government but, if he had so done, that would constitute a separate and distinct offense, not charged in the indictment, to the offenses for which petitioner had been indicted and was being tried.

Upon the trial of the case, the Government tendered as certain of its witnesses, Ben P. Pipgrass, E. S. Horner, Ballard Clark, John Stephens, and E. P. Harvey, being the witnesses who had purchased, or had represented the purchasers, of all the gasoline alleged in the indictments, consolidated, to have been sold by petitioner upon which he was alleged to have attempted to defeat and evade payment of the taxes due thereon and which he was alleged to have wilfully failed and refused to pay, and having been examined on voir dire by petitioner under permission of the Court, all testified that they were "producers of gasoline" or represented "producers of gasoline" in their respective purchases of gasoline from petitioner, and that the gasoline so purchased was purchased for resale; petitioner objected to the testimony of each of these witnesses, for the reason that they were "producers of gasoline", that the gasoline purchased from petitioner by them was purchased for resale, and, therefore, these transactions were exempt from the payment of such taxes by petitioner, such testimony was irrelevant, immaterial, prejudicial and contrary to the allegations contained in the indictment, which objections were by the Court overruled, and to which action the defendant then and there excepted.

Also upon the trial of this cause, the Government called as one of its witnesses, Sid B. Pope, joint defendant with petitioner in cause No. 8922, consolidated, who testified that he was head bookkeeper and auditor for petitioner for a while; that he had in his possession certain books

and records belonging to petitioner, that his duties only was to keep books and serve as auditor for petitioner, that his duties went no further, and that he had nor did he exercise any control over the business or policies of the companies operated by petitioner. Having been permitted to be examined by petitioner on voir dire, he testified further that petitioner did not give him his permission to take and produce such books and records, and that no search warrant had been issued to seize them, he nevertheless was permitted, over the objection of petitioner, to testify that certain of the books and records he had in his possession showed certain gasoline taxes due by petitioner that had not been paid.

Petitioner was unable to meet the conditions of his suspended sentence, and after various delays and extensions of time within which he might do so, a part of which time, petitioner was a fugitive from the jurisdiction of the Court, he voluntarily appeared before the Trial Court on April 23rd, 1942, admitted his inability to so comply, and was sentenced to two years confinement in the United States Penitentiary at Leavenworth, Kansas, with no fine, no provisions as to the payment of taxes, and without further suspended sentence; that immediately upon the so sentencing of petitioner, the Honorable T. Whitfield Davidson, United States District Judge for the Northern District of Texas, who had presided over petitioner's trial, and who had meted out all sentences, left for Washington, D. C., for an extended time to hold Court in the District of Colum-

bia; that appellant, in due time after the sentence imposed on April 23rd, 1942, appealed his case to the United States Circuit Court of Appeals for the Fifth Circuit, and consulted with and received orders from that Court with reference to the perfection of his appeal instead of the Trial Court, who was away; that in due time and within the time allowed him by the Circuit Judges, he prepared and filed his bill of exceptions and assignment of errors; that thereafter, being unable to pay the United States District Clerk for a transcript, and to pay costs of printing and other expenses incident to his appeal, he filed his paupers oath and petition to the United States Circuit Court of Appeals for the Fifth Circuit, seeking to prosecute his appeal in forma pauperis; the United States District Attorney seasonably filed his motion to dismiss the appeal on the grounds that no transcript of the record and no brief had been filed, and that petitioner had not paid the costs incident to the appeal, and that petition for permission to prosecute appeals in forma pauperis should be denied on the grounds the appeal was without merit.

The motion was set down for hearing before the United States Circuit Court of Appeals for the Fifth Circuit at its November (1942) Term at Fort Worth, Texas, and was orally argued, and on November 21st, 1942, the Court rendered its opinion dismissing the appeal, solely on the grounds that the sentence entered on April 23rd, 1942, could not be appealed from, that petitioner should have instituted his appeal within five days from the date of his

original conviction, June 16th, 1937, and denied permission to prosecute appeal in forma pauperis, copy of which said opinion is here brought forth and appears in Appendix.

Petitioner duly and timely filed his petition for rehearing, and on the 23rd day of December, 1942, the Court overruled same without written opinion; that upon petitioner's petition, timely filed, the United States Circuit Court of Appeals for the Fifth Circuit, stayed issuance of mandate herein for thirty days from December 23rd, 1942, to allow him to prosecute this petition for certiorari to this Honorable Court.

Statement as to Jurisdiction

Petitioner appealed from the conviction and sentence imposed on June 23rd, 1942, to the United States Circuit Court of Appeals for the Fifth Circuit and on November 21st, 1942, that Court Dismissed the appeal, and on December 23rd, 1942, denied, without written opinion, petition for rehearing.

Jurisdiction is conferred upon the Supreme Court in this cause by Section 347a Title 28, U. S. C. A., and by Rule 35 (B) of the Supreme Court of the United States, which provides as one of the reasons for the granting of writs of certiorari is where the Circuit Courts of Appeal have "decided an important question of Federal law which has not been, but should be, settled by this Court."; and

by Rule 36, providing that "public interest will be promoted by prompt settlement in this Court of the questions involved" in this cause.

Questions Presented

1. Whether one who was convicted June 16th, 1937, given a suspended sentence with impossible conditions, may appeal from an entirely new and different judgment entered April 23rd, 1942, imposed after ones admitted inability to comply with conditions of the suspended sentence imposed June 16th, 1937.

2. Whether an indictment alleging that the defendant sold gasoline to purchasers thereof who were not "producers of gasoline", and thereby became indebted to the Government for taxes thereon, is supported by testimony that all the gasoline so sold and set out in the indictment was actually sold to "producers of gasoline," for resale, when the Statute, under which prosecution was brought, specifically exempts the defendant from payment of taxes under such transactions.

3. Whether, where indictment alleges taxes to be due on gasoline sold by a refiner to persons "not producers of gasoline" for resale, it is error of a substantial nature to admit testimony of such purchasers of such gasoline, all of whom were actually "producers of gasoline," buying it for resale, that their companies had paid the taxes to petitioner, but he had not remitted same to the Government.

4. Whether a bookkeeper of a defendant, admitting no other position of control or management or authority, other than to keep books, may bring books and records of the defendant into Court and give damaging testimony against him from such books and records without his permission, and where no search warrant has been issued and served.

5. Whether an indictment charging two separate and distinct offenses in single counts is subject to specific demurrers filed on account of its duplicity.

Reasons Relied Upon for Allowance of Writ

1. The United States Circuit Court of Appeals for the Fifth Circuit dismissed this appeal solely on the grounds that the appeal was without merit, in that it was not timely brought. There was no contention that appellant's petition to prosecute his appeal in forma pauperis was not otherwise meritorious. Neither did they pass upon the errors assigned in the trial of the cause. That Honorable Court cites Rule III for Criminal Procedure, following 728 U. S. C. A., following Section 23a, now Title 18, Sec. 688, U. S. C. A., as reasons for dismissal. Petitioner urges that under that Rule, he is entitled to bring his appeal, in that, although it was based on a conviction had June 16th, 1937, the sentence imposed on April 23rd, 1942, may be appealed from. It was a new, separate, distinct and final judgment, regardless of the time of the conviction upon which that judgment was based.

The Circuit Court of Appeals cites also certain cases upon which they relied in dismissing the appeal. They cite *Kinney vs. Plymouth Rock Squab Co.*, 236 U. S. 43, a civil case bearing on prosecution of cases in forma pauperis. Petitioner admits the soundness of the theory that a case without merit should not be allowed to be prosecuted in forma pauperis. However, that Court cites *Fewox vs. U. S.*, 77 F. (2) 688; *Miller vs. U. S.*, 104 F. (2), 343; *U. S. vs. Tousey*, 101 F. (2) 892, in support of its decision that petitioner cannot appeal from the judgment entered April 23rd, 1942. Petitioner respectfully urges that none of these cases are in point with this one. No question of a suspended sentence, later revoked, is raised in these cases. Each of them simply cite instances where appellants did not file their notices of appeal five days from the date of conviction and sentence. This particular question has not been passed upon by this Court.

2. and 3. The indictments in this case, consolidated, specifically allege that petitioner, a refiner of gasoline, was bounden to pay to the Government one cent per gallon on all gasoline manufactured and sold by him, and that as such, he sold certain gasoline set out in the indictment to purchasers thereof, who were not "producers of gasoline" and, thereby, exempt from the payment of such tax, whereas in truth and in fact, every sale proved was made to "producers of gasoline" for resale, and were, thereby (under Title 26, Sec. 3412 U. S. C. A.) exempt from the payment of such taxes. The Government

sought to justify this allegation and proof upon the theory that such purchasers of gasoline remitted to petitioner for the taxes, and simply that petitioner failed to remit it to the Government. Of course, it is a violation of the laws of the United States for one to come into possession of moneys belonging to the Government, fail and refuse to remit it to the proper authorities and to appropriate it to ones own use and benefit, but he cannot be convicted for this offense under an indictment charging him with the offense described under the statute above cited, and under which this prosecution was brought.

4. The admission of the testimony of Sid B. Pope, taken from the books and records of petitioner, tending to incriminate petitioner, where it is admitted that Pope had no authority except that as a bookkeeper and auditor, and that he had no permission from petitioner to so bring and produce his books and records, is clearly in violation of the Fifth Amendment to the Constitution and all of the almost sacred opinions of this Court from its inception.

5. Petitioner urges that where an indictment is so faulty as to attempt to charge two offenses in single counts it is not within the discretion of the Court to overrule a demurrer and motion to quash. He believes that the indictment is fundamentally bad.

Wherefore, your petitioner respectfully prays that writ of certiorari issue to the Honorable, the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to command the United States District Clerk

for the Northern District of Texas to prepare and certify to that Court transcript of the record of the proceedings of the Trial Court and such other matters as pertain to this cause, and upon receipt thereof from said Trial Court the said the Honorable Circuit Court of Appeals for the Fifth Circuit to certify to this Court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket No. 10310, *W. L. Nix vs. United States*, and that the judgment of the Circuit Court of Appeals dismissing this appeal be reversed, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem proper.

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